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No. 08-1172

In the Supreme Court of the United States

JOSEPH P. NACCHIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NEW YORK COUNCIL OF DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is the nation's preeminent professional bar association of criminal defense attorneys. Founded in 1958, NACDL is a non-profit organization with a national membership of over 12,800 attorneys and more than 35,000 affiliate members from all 50 states and several countries. NACDL's members include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges, dedicated to ensuring justice and preserving fairness for those accused of committing crimes.

NACDL actively participates in matters addressing the legal and practical implications of criminal punishment. NACDL frequently appears before this Court as *amicus curiae* in cases that present issues of national importance to criminal defendants and their lawyers. This Court has referenced NACDL's views on several occasions. See, *e.g.*, *Kennedy* v. *Louisiana*, 128 S. Ct. 2641, 2663 (2008) (citing NACDL brief); *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 344 n.3 (2006) (same); *Brigham City* v. *Stuart*, 547 U.S. 398, 404 (2006) (same); *Blakely* v. *Washington*, 542 U.S. 296, 312 (2004) (noting NACDL's participation as *amicus*).

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice of *amici's* intention to file this brief at least 10 days prior to its due date. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 235 lawyers, many of whom are former prosecutors, whose principal area of practice is criminal defense in state and federal courts in New York. NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, and promoting the proper administration of criminal justice.

As *amicus*, NYCDL offers the Court the perspective of practitioners who regularly handle some of the most complex and significant white collar criminal cases in the state and federal courts. NYCDL's *amicus* briefs have been cited by the Court or concurring justices in cases such as *United States* v. *Booker*, 543 U.S. 220 (2005), and *Rita* v. *United States*, 551 U.S. 338 (2007).

Because the majority of NACDL's and NYCDL's members are active criminal litigators, we believe we can assist the Court in understanding the implications of this case on the criminal justice system as a whole.

Joseph Nacchio's petition raises questions of significant concern to accused individuals who seek to use expert witnesses in their defense. The Tenth Circuit's decision has cast doubt on traditional criminal trial practice by requiring the substantial burdens of civil expert practice in the context of what is normally a routine discovery notice. NACDL and NYCDL have a vital interest in the resolution of this case to clarify expert procedure in complex criminal cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

Nacchio's petition raises issues of serious concern to the criminal defense bar. The Tenth Circuit's *en banc* decision affirmed the district court's exclusion of testimony by Nacchio's economic expert, Professor Daniel Fischel, a nationally renowned authority on corporate law and financial markets. Fischel was Nacchio's only substantive witness, and his testimony was key to the defense, as he would have explained to the jury the non-impact the allegedly inside information had on Qwest's stock price once it was disclosed, and how Nacchio's stock sales were consistent with his trading patterns and those of other similarly situated executives. This type of testimony is common in securities fraud and insider trading cases because of the jury's need for assistance in understanding the complex nature of the facts, and it is virtually never excluded.

The district court's decision to exclude Fischel's testimony was based on a misapplication of the Federal Rules and a misunderstanding of criminal trial practice. Nacchio provided the government with notice of Fischel's proposed testimony under Federal Rule of Criminal Procedure 16. Although the notice complied with the requirements of Rule 16—it contained a summary of Fischel's opinions, the basis for those opinions, and his qualifications—the government moved to exclude his testimony on grounds that the notice did not satisfy the standards for admissibility under Federal Rule of Evidence 702 and *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The district court agreed and excluded Fischel's testimony—after he had already taken the stand—without allowing Nacchio to ad-

dress the *Daubert* concerns in a separate hearing or by laying foundational testimony. The Tenth Circuit's decision endorsing this approach conflicts with the decisions of other courts of appeals and is a departure from the accepted course of proceedings in criminal trials.

This Court should grant review to clarify the differences between civil and criminal expert discovery—an important question affecting the constitutional rights of the accused. The Tenth Circuit has effectively eliminated Rule 16 as a practical matter and will force criminal defendants to provide the equivalent of a civil expert report to the government or face the exclusion of critical evidence. These issues frequently arise in criminal trials and the government will be greatly and unfairly advantaged by this procedural loophole. The Tenth Circuit's decision merits review to protect juries' ability to hear expert opinion testimony necessary to assist them in understanding the complexities of modern white collar criminal prosecutions.

ARGUMENT

THE TENTH CIRCUIT'S RULING ON THE EXCLUSION OF EXPERT TESTIMONY CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND IS CONTRARY TO ACCEPTED CRIMINAL PRACTICE

The Tenth Circuit, in a sharply divided *en banc* decision, affirmed an evidentiary ruling of the district court that was erroneous on several levels and, if left in place, will have ramifications throughout the criminal justice system. *First*, the Tenth Circuit approved the improper imposition of the burdens of an extensive civil expert report onto a routine de-

fense notice. This decision basically erases the Federal Rules of Criminal Procedure and ignores the reasons for the differences between the civil and criminal rules. *Second*, the Tenth Circuit allowed the district court to exacerbate its procedural error by ordering the most drastic penalty possible. The decision to exclude Nacchio's expert, while allowing two government experts to testify on the same topics, was an extreme sanction that was inconsistent with settled procedure and the very nature of criminal trials, and it impacted the defendant's constitutional rights. *Third*, the testimony excluded by the district court was the type of evidence that is common in white collar criminal cases to help the jury understand complex economic facts, and its exclusion was fatal to Nacchio's defense. The potential for abuse by the government in future cases, and the resulting harm to the accused, is of vital importance to all criminal defense attorneys.

A. The Tenth Circuit's Decision Effectively Eliminates Rule 16 And Forces Criminal Defendants To Comply With The Civil Expert Discovery Rules

If a defendant requests discovery from the government about its experts, then the defendant must reciprocate by providing a "written summary" of any expert testimony he intends to use that supplies "the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." Fed. R. Crim. P. 16(b)(1)(C). The rule is "intended to permit more complete pretrial preparation" by the opposing party, not "to create unreasonable procedural hurdles." Fed. R. Crim. P. 16 advisory committee's note (1993 amend.). Rule 16 disclosures are therefore simple by design, as the level of specificity required

is left undefined by the rule. See *United States* v. *Mehta*, 236 F. Supp. 2d 150, 155 (D. Mass. 2002) ("The *type* of information that must be disclosed under this Rule is thus very clear. The *quantity* and *specificity* required of the disclosure, however, is less so."); 25 James W. Moore, MOORE'S FEDERAL PRACTICE § 616.05[3] (3d ed. 1997) ("It is not clear how much detail must be provided to satisfy [Rule 16].").

Rule 16 disclosures are generally a part of routine discovery correspondence that NACDL's and NYCDL's practitioner members regularly submit to, and receive from, the government. These disclosures are intended simply to provide notice of an intent to call an expert witness and to inform the opposition of the content of her testimony. They are not filed with the court, and disputes are most often resolved without its intervention. See Pet. App. 115a n.5. Accordingly, *amici's* members normally provide only a written summary of an expert's testimony and a resume or curriculum vitae to support her qualifications. Courts that have examined the requirements of Rule 16 disclosures (often in the context of government notices) have held that nothing more is necessary. See, *e.g.*, *United States* v. *Duvall*, 272 F.3d 825, 828 & n.1 (7th Cir. 2001) (government provided a brief summary of expert's testimony, stating that his opinions "will be based on his education, training and experience" and attaching a resume to support his qualifications) (citing *United States* v. *Jackson*, 51 F.3d 646, 651 (7th Cir. 1995)); *United States* v. *Rogers*, No. 05-292, 2006 WL 5249745, at *3 (D.D.C. July 17, 2006) ("A party sufficiently states an expert's basis for his testimony by noting the experts' education, training and experience and attaching a resume."); cf. *United States* v. *Barile*, 286 F.3d 749, 758 (4th Cir. 2002) (rejecting a Rule 16 disclosure

that "did not describe [the expert's] opinions beyond stating the conclusion he had reached and did not give the reasons for those opinions"). This practice also conforms with the American Bar Association's Standards for Criminal Justice, which state that defendants should "furnish to the prosecution a curriculum vitae and a written description of the substance of the proposed testimony of the expert's opinion, and the underlying basis of that opinion." ABA Standards for Criminal Justice § 11-2.2(a)(ii) (3d ed. 1996); see *id.* § 11-2.1(a)(iv) (same requirement for prosecution). Nacchio provided all of this information and more to the government in his March 29, 2007 Rule 16 disclosure. See Pet. App. 300a-329a.

The Tenth Circuit ran afoul of the rule by holding that Nacchio's Rule 16 disclosure was insufficient because it did not include adequate material to evaluate the admissibility of his expert testimony under Federal Rule of Evidence 702 and *Daubert*. Because Rule 16 only requires notice, if the government wishes to challenge admissibility, a separate process exists to evaluate the expert and the bases for his opinions. That process typically involves the defendant calling his expert witness, eliciting foundational testimony from her, and allowing the government to cross-examine her in order to test her qualifications. As the Tenth Circuit recognized, "the prevalent practice is to address *Daubert* issues at voir dire." Pet. App. 21a n.10 (citing NACDL's *amicus* brief); see also *id.* at 55a (McConnell, J., dissenting). This is both the overwhelming experience of *amici's* members and the predominant practice recognized by the courts of appeals. See, *e.g.*, *Goebel* v. *Denver & Rio Grande W. R.R.*, 215 F.3d 1083, 1087 (10th Cir. 2000); *United States* v. *Diaz*, 300 F.3d 66, 74 (1st Cir. 2002); *United States* v. *Conn*, 297 F.3d

548, 557 (7th Cir. 2002); *United States* v. *Alatorre*, 222 F.3d 1098, 1104 (9th Cir. 2000); *El Aguila Food Prods., Inc.* v. *Gruma Corp.*, 131 F. App'x 450, 452 (5th Cir. 2005); *United States* v. *Jimenez*, 111 F.3d 139 (table), 1997 WL 173912, at *1 (9th Cir. Apr. 3, 1997). Even *Daubert* instructs that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means" of testing expert evidence. 509 U.S. at 596.

But whether the *Daubert* issues are addressed at voir dire or at a separate hearing, nothing in the rules or standard criminal trial practice requires the defendant to address them in a Rule 16 disclosure. The Tenth Circuit's crucial error was its holding that the government's motion *in limine* put Nacchio on notice that he had to proffer *Daubert* material. As the Panel remarked, it is "a mistake to regard the Rule 16 disclosure as a substitute for a *Daubert* hearing." Pet. App. 116a. We are unaware of any cases, and the Tenth Circuit found none, that hold that a defendant's expert may be excluded under *Daubert* because his Rule 16 disclosure was insufficient. Rule 16 applies to both the government and the defense, but neither is required to turn over the equivalent of a civil expert report. "Unlike under the civil rules, an expert in a criminal case is *not* required to present and disclose an expert report in advance of testimony." *Id.* at 117a-118a. See Margaret A. Berger, *Procedural Paradigms for Applying the* Daubert *Test*, 78 MINN. L. REV. 1345, 1360 (1994) (observing that Rule 16's "requirement of setting forth 'the bases and reasons for' the witnesses' opinions does not track the methodological factors set forth by the Daubert Court"). This critical difference is due to "the special constitutional constraints of criminal proceedings,"

Mehta, 236 F. Supp. 2d at 155, which allow a criminal defendant to wait until after the government has presented its case before revealing his evidence, if at all. See Berger, *supra*, at 1363 (arguing that the "procedural landscape" of expert discovery is "obviously vastly different in civil cases" because, "unlike criminal defendants who need not present a case, civil plaintiffs will always have some expert testimony available or they would not be in court").

It is simply not the practice of lawyers in criminal cases to provide anything even approaching an expert report or other *Daubert* material at the Rule-16-notice stage. Indeed, it is undoubtedly rare—*amici* are unaware of any such instance—for the government to provide the defense with a Rule 16 expert notice that lays out the full *Daubert* justification (or anything even approaching it) for the proposed testimony. By grafting a Rule 702-*Daubert* analysis onto Rule 16's bare-boned requirements, the Tenth Circuit confused the logical procedural sequence of discovery and invented a new obligation from whole cloth, thereby both impermissibly interfering with Nacchio's ability to present his defense and effectively circumventing Rule 16 by allowing the government to obtain the equivalent of a civil expert report in advance of the defense expert's testimony. This new rule shifts the burden onto a defendant—to marshal his *Daubert* arguments into what was routine discovery correspondence—and away from the government—which normally has the burden of proffering facts sufficient to show that a *Daubert* hearing is necessary. This ruling casts doubt on the long-standing procedure followed in criminal cases.

Amici's members are rightly concerned that, if allowed to stand, the Tenth Circuit's decision will al-

low the government will gain unfair advantage from this procedural anomaly and routinely file motions *in limine* in response to Rule 16 disclosures. In the Tenth Circuit's view, the defendant would then have to proffer an expert report in response. It would be an extreme departure from the usual course of proceedings for the mere filing of a motion to put the defendant on notice that *Daubert* issues will not be resolved in the usual manner (at a hearing or on the stand) *and* that he will be expected to carry the burden of proving the admissibility of his expert testimony in the first instance. Review is warranted because otherwise the Tenth Circuit's ruling will result in the effective elimination of Rule 16 and the adoption of civil discovery rules in criminal cases.

B. The Tenth Circuit's Decision Is Inconsistent With Criminal Defendants' Constitutional Rights And The Integrity Of The Criminal Judicial Process

As this Court has stated, "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973); see *Washington* v. *Texas*, 388 U.S. 14, 19 (1967). This right is not absolute. A defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers*, 410 U.S. at 302. He must respect the "legitimate interests in the criminal trial process," *id.* at 295, such as the "integrity of the adversary process * * * the fair and efficient administration of justice, and * * * the truth-determining function of the trial * * *." *Taylor* v. *Illinois*, 484 U.S. 400, 414-415 (1988). But at the same time, courts may not create procedures that ignore "the

fact that the Defendant has no obligation to present a defense until the Government has established its case." *United States* v. *Impastato*, 535 F. Supp. 2d 732, 743 (E.D. La. 2008); see also ABA Standards for Criminal Justice § 11-7.1(a)(iii) (3d ed. 1996) (penalties for discovery violations are "subject to the defendant's right to present a defense" and must not "work an injustice either to the prosecution or the defense").

NACDL and NYCDL have an inherent interest in seeing that criminal trials follow procedures that respect these bedrock principles while focusing on the ultimate goal of seeing justice done. The procedures sanctioned by the Tenth Circuit did neither. The Tenth Circuit erred in holding that Nacchio's submission was insufficient because it did not satisfy *Daubert* when Rule 16 contains no such requirement and the district court did not inform Nacchio that he would have to respond to the government's motion *in limine* with a written proffer that would satisfy *Daubert* by itself, without a hearing or voir dire. But in addition to its procedural error, the court also approved the harshest punishment available—total exclusion of Fischel's expert testimony.

As courts have repeatedly emphasized, exclusion of witnesses is an "extreme sanction." *Short* v. *Sirmons*, 472 F.3d 1177, 1188 (10th Cir. 2006), cert. denied, 128 S. Ct. 103 (2007); see *United States* v. *Harvey*, 117 F.3d 1044, 1048 (7th Cir. 1997) ("Without a violation of any clearly-established rule or duty, however, the drastic sanction of precluding a witness altogether is unwarranted."); *United States* v. *Peters*, 937 F.2d 1422, 1426 (9th Cir. 1991). Even under *Daubert*, "rejection of expert testimony is the exception rather than the rule." Fed. R. Evid. 702 advi-

sory committee's note (2000 amend.); see also *Taylor*, 484 U.S. at 413, 416 (exclusion of a witness is proper for "willful and blatant" discovery violations, but "alternative sanctions are adequate and appropriate in most cases").

Compounding the problem, the court prevented Nacchio's expert from testifying about topics about which two government experts had testified. This ruling crippled his defense and trampled on his Sixth Amendment rights. "It is an abuse of discretion to exclude the otherwise admissible opinion of a party's expert on a critical issue, while allowing the opinion of his adversary's expert on the same issue." *United States* v. *Lankford*, 955 F.2d 1545, 1552 (11th Cir. 1992) (internal quotation marks omitted). See also *United States* v. *Gaskell*, 985 F.2d 1056, 1063-1064 & n.7 (11th Cir. 1993) (expressly tying the requirement that expert testimony for the defense be admitted to the admission of similar testimony by prosecution expert); *United States* v. *Sellers*, 566 F.2d 884, 886 (4th Cir. 1977) (holding that district courts must exercise their discretion to exclude witnesses "even-handedly," and that a district court failed to act appropriately when it banned the defense's expert but allowed the government's to testify).

The Tenth Circuit's decision to allow the government to present expert testimony on a vitally important issue without rebuttal is a blatant departure from the usual course of criminal proceedings and it disregards the "truth-seeking goal" of the criminal trial process as protected by the Sixth Amendment. *Maryland* v. *Craig*, 497 U.S. 836, 857 (1990). As Chief Judge Henry remarked in dissent, this "draconian decision * * * flies in the face of the truth-finding goals of trial, the constitutional safeguards to

a full defense, [and] the liberal thrust of the rules of evidence * * *." Pet. App. 99a (Henry, C.J., dissenting). Review is warranted to make clear that even high-profile white collar cases must be tried fairly and expeditiously within the bounds of the rules and the Constitution.

C. The Tenth Circuit's Decision Makes It Less Likely That Juries Will Have Access To Essential Expert Opinion Testimony In Complex Criminal Cases

Fischel's excluded expert opinions on the economics of Nacchio's trades and the market context in which they were made were precisely the type of helpful evidence that is essential in jury trials of complex criminal cases.[2] NACDL and NYCDL believe that the Tenth Circuit's opinion, if allowed to stand, will change the landscape in securities litigation and other white collar cases.

"Professor Fischel's testimony was to include a discussion of the economic incentives that inside information would have given Nacchio, the statistical significance of the differences in his trading patterns, and the likelihood that economic diversification better explained the challenged sales than inside information." Pet. App. 124a; see also *id.* at 7a (*en banc* court discussing the contents of Rule 16 disclosure). Fischel planned on comparing Nacchio's disputed sales to his selling history and that of other execu-

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[2] The relevance of Fischel's expert testimony was not addressed by the *en banc* court. See Pet. App. 79a (McConnell, J., dissenting). However, Nacchio argues that the decision should be reversed in part because of the Tenth Circuit's failure to consider the district court's error in excluding Fischel's testimony on relevance grounds. See Pet. 32-35.

tives and evaluating the reaction of the market to the information on which Nacchio allegedly relied. Fischel "is the former dean of the University of Chicago Law School, and the nation's leading expert in securities matters. He has testified more than 200 times (including for the government) and had never before been excluded." Pet. 3; see also Pet. App. 96a (Henry, C.J., dissenting). As Chief Judge Henry noted, "Had the district court admitted this evidence, [the Tenth Circuit] would not have questioned it for a nanosecond." Pet. App. 97a (Henry, C.J., dissenting).

NACDL's and NYCDL's practitioner members routinely introduce expert testimony in complex criminal cases involving issues such as securities fraud, where juries frequently need assistance in understanding how markets react to corporate communications and in interpreting analyst reports and price movements. Even the drafters of the Federal Rules of Evidence have recognized that "how financial markets respond to corporate reports" is an appropriate area for an expert to educate a jury. Fed. R. Evid. 702 advisory committee's note (2000 amend.). As the Panel remarked, "expert testimony is routine when a materiality determination requires the jury to decide the effect of information on the market." Pet. App. 125a (citing 3 Alan R. Bromberg & Lewis D. Lowenfels, BROWBERG AND LOWENFELS ON SECURITIES FRAUD & COMMODITIES FRAUD § 6:153 (2d ed. 2007)). More succinctly, "Armchair economics is not the way to decide complex securities cases." Pet. App. 125a; see also *United States* v. *Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991) ("Particularly in complex cases involving the securities industry, expert testimony may help a jury understand unfamiliar terms and concepts.").

Defense attorneys are not alone in seeking to introduce testimony that will assist the jury in understanding complicated economic evidence. Indeed, the government frequently offers such testimony in criminal securities cases. For example, in a similar insider trading case, the government sought to introduce the expert testimony of a securities law professor to help the jury "understand the materiality of the types of information, such as earning reports and unannounced corporate deals, that the defendant possessed when he executed his trades." Govt.'s Opp'n to Def.'s Mot. *In Limine* to Exclude Testimony of Dr. Peter Huang at 2, *United States* v. *Heron*, No. 2:06-cr-674 (E.D. Pa. Oct. 5, 2007). The government in *Heron* made the same arguments as Nacchio for the reliability and relevance of its expert, concluding that it was necessary to help the jury because "[u]nlike a violent crime * * * insider trading is much more complex." *Id.* at 10. This contrasts starkly with the district court's conclusion here that such testimony would not assist the jury because this was like "a simple negligence case." Pet. App. 249a. Moreover, the government was able to present two analysts of its own and exploit their unrebutted testimony in its closing argument. See Pet. 11. The government's attempt to have it both ways underscores the need for this type of evidence to be presented fairly and evenly in these kinds of cases.

This case merits review because otherwise there is a danger that juries will be deprived of expert opinions that will help them navigate the murky waters of complex white collar criminal trials. As one commentator notes, this is especially important "given the large sentences that are being given to those convicted of corporate related crimes." Ellen S. Pogdor, Nacchio *Commentary*, White Collar Crime

Prof. Blog, Mar. 17, 2008, http://lawprofessors.typepad.com/whitecollarcrime_blog/2008/03/nacchio-comment.html. Recently, courts have been recognizing "that the increasing complexities of the financial markets often necessitate expert testimony to ensure both a defendant's right to a fair trial and respect for a defendant's Sixth Amendment right to present a defense." Joseph W. Martini et al., *The Need for Expert Testimony: In Complex Securities Cases, Jurors Might Need Extra Help*, 34 CONN. LAW TRIB. No. 21, at 2 (May 26, 2008). Even detractors of such testimony observe that the Tenth Circuit in this case has perhaps written "the final chapter in the era of excessive deference to economic analysis." J. Robert Brown, U.S. *v.* Nacchio*: The Death Knell for Special Treatment of Economic Analysis in Securities Cases?*, TheRacetotheBottom.org, Feb. 26, 2009, http://www.theracetothebottom.org/nacchio-trial/us-v-nacchio-the-death-knell-for-special-treatment-of-econom.html. This Court should grant the petition so that jurors in white collar cases will not be left adrift in a sea of confusing economic evidence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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